No. 84-468

IN THE

Supreme Court of the United States

October Term, 1984

CITY OF CLEBURNE, TEXAS, *et al.*,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT AND PETITIONERS' SUPPLEMENTAL BRIEF AFTER ARGUMENT

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June 14, 1985

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PETITIONERS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT

Pursuant to U.S. Sup. Ct. Rule 35.5, 28 U.S.C.A., Petitioners respectfully request the Court for leave to file the attached Supplemental Brief After Argument.

The grounds for this motion are that on June 7, 1985, the Governor of the State of Texas signed a bill which provides that community-based residential facilities operated by a provider under the intermediate care facilities for the mentally retarded program are restricted to six disabled persons and are permitted uses in residential zoning districts in the State of Texas. The Petitioners bring this newly enacted legislation to the Court's attention because it is

a "development which may conceivably affect the outcome of the litigation." See *Board of License Commissioners of the Town of Tiverton v. Pastore*, 105 S.Ct. 685, 686 (1985).

For these reasons, the Petitioners' Motion for Leave to File Supplemental Brief should be granted.

Respectfully submitted,

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PETITIONERS' SUPPLEMENTAL BRIEF AFTER ARGUMENT

On June 7, 1984, the Governor of the State of Texas signed S.B. 940 which states that community-based residential facilities operated by a provider under the intermediate care facilities for the mentally retarded program are restricted to six persons and are permitted uses in residential zoning districts in the State of Texas. See Appendix A. By this action, the State of Texas has now signaled its clear intention to limit community-based facilities for the mentally retarded to six persons and two supervisory personnel, thus, emulating the good judgment and wisdom of the members of the City Council of Cleburne who would not grant a special use permit to operate a facility for

thirteen mentally retarded men and women and two supervisory personnel at 201 Featherston. (J.A. 92).

The District Court recognized that "the size of the home and the number of people to be housed" was a factor which entered into the decision of the City Council members to deny the special use permit request. (J.A. 95). The District Court's finding was based on the testimony of the City Councilman Alfred Johns, who stated that one of the reasons he voted to deny the special use permit was because he did not think the property was large enough for the requested facility at 201 Featherston St. (J.A. 25), and because he did not think the property was large enough to afford recreation for at least thirteen mentally retarded persons. (J.A. 26). City Councilman Arval Martin also stated that the location of the facility for the mentally retarded was inappropriate because the yard was too small. (J.A. 29). City Councilman J. T. Bass also testified that the property was not adequate for the use it was intended, including very little yard space and no recreation facilities. (J.A. 24). Thus, the District Court determined that the City Council's action in denying a special use permit to Jan Hannah passed constitutional muster under the rational basis test. (J.A. 103).[1]

S.B. 940, which becomes effective, September 1, 1985, clearly does not limit the City's regulatory authority over any community-based residential facility wherein the com-

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[1]It is interesting to note that Counsel for the Respondents during oral argument stated that any action by the State of Texas to limit the number of mentally retarded in an ICF-MR facility to six persons would only be subjected to rational basis scrutiny rather than to heightened scrutiny. See Transcript of Proceedings before the Supreme Court of the United States on April 23, 1985 at p. 30.

mercial operator seeks to provide services to seven or more mentally retarded persons. Therefore, the City of Cleburne's zoning authority to deny a special use permit to a facility seeking to pack thirteen people into a 2510 square foot house is left intact and is not mooted by the action of the State of Texas.[2] In addition, if as Respondents have claimed, they were grandfathered out of Tex. Dept. of Human Resources Rule 326.35.03.005, 7 Tex. Reg. 1641 (1982),[3] which limits such facilities to six persons, then S.B. 940 would not be applicable to them since they would have more than six persons. Under these circumstances, the zoning authority would still be vested with the City of Cleburne.

However, when S.B. 940 becomes effective on September 1, 1985, Cleburne Living Center, Inc., will only be able to place six mentally retarded individuals in the facility at 201 Featherston. Such limitation would effectively preclude the operation of the facility according to Mr. David Southern, one of the corporate officers and shareholders of the Cleburne Living Center, Inc., who testified that the Cleburne Living Center would not be able to break even financially with less than ten or eleven people in the facility. (J.A. 32, R. Vol. II, pp. 59-60).

The enactment of S.B. 940 precludes any necessity for this Court to remand this case to District Court for a

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[2]Furthermore, S.B. 940 recognizes that a city may even regulate by ordinance the number of motor vehicles which the mentally retarded residents of a community-based facility may keep on the premise of the facility or on the public rights-of-way adjacent to the home.

[3]This TDHR regulation, which appears in Appendix A to Petitioners' Reply Brief was adopted on April 9, 1982 and became effective on May 17, 1982. The rule was proposed in 7 Tex. Reg. 58 (January 8, 1982) which appears at J.A. 78-81 as Def. Ex. 10, R. Vol. III, p. 304.

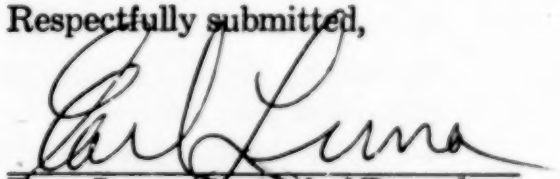
determination of the Ordinance's relationship to state policy regarding community-based facilities for the mentally retarded. Thus, the City Council's decision to deny the Respondents a special use permit on the basis of "the size of the home and the number of people to be housed," was a legitimate consideration, which wisdom has been followed by the State of Texas' limitation of six mentally retarded individuals to one facility, and which should pass constitutional muster under the rational basis test. S.B. 940 is evidence of the fact that the needs of the mentally retarded should be addressed legislatively rather than by the judiciary. Thus, the constitutional approach may be avoided. See *Harris v. McRae*, 448 U.S. 297, 307, 100 S.Ct. 2671, 2683 (1980).

However, should this Court determine the case at bar is moot, the Court should reverse or vacate the judgment of the Fifth Circuit and remand the case to the Fifth Circuit for entry of an appropriate order directing the District Court to dismiss the action as moot. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 106 (1950).

CONCLUSION

For the foregoing reasons, as well as those stated in Brief for Petitioners and Petitioners' Reply Brief, this Court should declare that the mentally retarded do not constitute a "quasi-suspect" class, the challenged zoning ordinance should be scrutinized at the rational basis level of review, found to be constitutional, as written and as applied, the judgment of the Court of Appeals should be reversed and the judgment of the District Court should be affirmed, or, in the alternative, if this Court determines this cause to be moot, this Court should reverse or vacate the judgment of the Fifth Circuit and remand the case to the Fifth Circuit for entry of an appropriate order directing the District Court to dismiss the action as moot.

Respectfully submitted,



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June 14, 1985

CERTIFICATE OF SERVICE

I, Earl Luna, counsel of record for Petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of the Petitioners' Motion for Leave to File Supplemental Brief After Argument and Petitioners' Supplemental Brief After Argument on all parties required to be served and on all Amici Curiae by depositing same in the United States mail, on the 15th day of June, 1985, with first class postage prepaid addressed to the following counsel of record at the addresses indicated, to wit:

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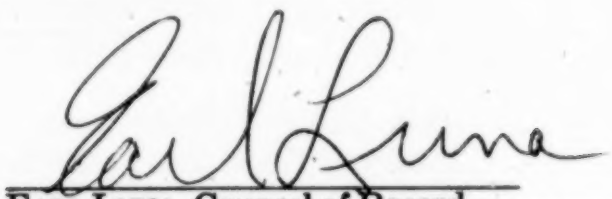

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APPENDIX A

TEXAS LEGISLATIVE SERVICE

SB 940
As Finally Passed and Sent to the Governor

6-10-20-21 — 355

AN ACT

relating to the requirements and standards for and location of family homes for disabled persons.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. SHORT TITLE. This Act may be cited as the Community Homes for Disabled Persons Location Act.

SECTION 2. DEFINITIONS. In this Act:

(1) "City" includes any incorporated city or town, including a home-rule city.

(2) "Department" means the Texas Department of Mental Health and Mental Retardation.

(3) "Disabled person" means a person who has a physical or mental impairment, or both, that substantially limits one or more major life activities.

(4) "Family home" means a community-based residential home operated by:

(A) the department;

(B) a community center organized under Section 3.01, Texas Mental Health and Mental Retardation Act (Article 5547-203, Vernon's Texas Civil Statutes), which provides services to disabled persons;

(C) a nonprofit corporation; or

(D) an entity certified by the Texas Department of Human Resources as a provider under the intermediate care facilities for the mentally retarded program.

(5) "Major life activity" means caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working.

(6) "Nonprofit corporation" means an entity subject to the Texas Non-Profit Corporation Act (Article 1396-1.01 et seq., Vernon's Texas Civil Statutes).

(7) "Permitted use" means a use by right that is authorized in all residential zoning districts in this state.

(8) "Physical or mental impairment" means orthopedic, visual, speech, or hearing impairments, Alzheimer's Disease, Pre-senile Dementia, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, autism, or emotional illness.

SECTION 3. FAMILY HOME REQUIREMENTS. (a) To qualify as a family home under this Act, a home must comply with this section.

(b) Not more than six disabled persons, regardless of their legal relationship to one another, and two supervisory personnel may reside in a family home at the same time.

(c) A family home must provide to the disabled residents the following services:

(1) food and shelter;

(2) personal guidance;

(3) care;

(4) habilitation services; or

(5) supervision.

(d) A family home must meet all applicable licensing requirements.

(e) A family home may not be established within one-half mile of a previously existing family home.

SECTION 4. FAMILY HOMES AS PERMITTED USES. In all residential zones or districts in this state, a family home that meets the requirements of this Act is a

permitted use. However, the residents of such home may not keep, on the premise of the home or on the public rights-of-way adjacent to the home, more than one motor vehicle per bedroom for the use of the residents of the home unless otherwise provided by city ordinance.

SECTION 5. EXCLUSION BY PRIVATE AGREEMENT PROHIBITED. Any restriction, reservation, exception, or other instrument created or amended on or after September 1, 1985, that relates to the transfer, sale, lease, or use of property may not prohibit the use of the property as a family home.

SECTION 6. EFFECTIVE DATE. This Act takes effect September 1, 1985.

SECTION 7. EMERGENCY. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 940 passed the Senate on May 2, 1985, by a viva-voce vote; and that the Senate concurred in House amendments on May 27, 1985, by a viva-voce vote.

Secretary of the Senate

I hereby certify that S.B. No. 940 passed the House, with amendments, on May 21, 1985, by a non-record vote.

Chief Clerk of the House

Approved:

Date

Governor